

if all the elements of a defense are set out entirely in the plaintiff's complaint. See, e.g., *Jones v. Bock*, 549 U.S. 199, 215 (2007); *Brownmark Films*, 682 F.3d at 690 & n.1; *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012); *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005).

The Court previously ruled, on reconsideration, that Walgreens had not established the prior express consent defense. Specifically, the Court concluded that taking Kolinek's allegations regarding consent as true, all elements of the defense were not established by the complaint. *Kolinek II*, 2014 WL 3056813, at *4. In this regard, the Court noted that it was not "adjudicat[ing] the accuracy of Kolinek's claim [regarding consent] at this point; that must await factual development. For now, the Court is required to take his allegation as true." *Id.* By this comment the Court intended to convey that although the complaint's relatively spare allegations regarding the pertinent facts were insufficient to establish the defense, further factual development might require a different conclusion.

The parties have also briefed and argued the "emergency purposes" exception. What the Court just characterized as the complaint's relatively spare allegations regarding the pertinent facts preclude dismissal under Rule 12(b)(6) on this basis as well. If the agency charged with interpreting the TCPA—namely, the Federal Communications Commission—had read the exception as covering any call to a customer about prescriptions, prescription refills, or anything of the sort, that interpretation would not only bind the Court but would also dictate the conclusion in this case. See *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 449–50 (7th Cir. 2010). But in fact there is no such interpretation of the TCPA by the FCC. The allegations in the complaint do not say enough about the nature or contents of the call to make it appropriate to dismiss the complaint at this stage of the case based on this particular affirmative defense. As with the express consent defense, further factual development is necessary. For this reason, the Court need not address the parties' countervailing arguments regarding regulations and commentary interpreting other statutes issued by agencies other than the FCC.

For these reasons, the Court denies the remainder the motion to dismiss. Walgreens is directed to answer the complaint by August 25, 2014. The case is set for

a status hearing on September 3, 2014 at 9:30 a.m. to set a schedule for further proceedings.


MATTHEW F. KENNELLY
United States District Judge

Date: August 11, 2014